Depository Trust Company *and* The Office & Professional Employees International Union, Local 153, AFL–CIO. Case 2–CA–23034

November 7, 1990

DECISION AND ORDER

BY MEMBERS CRACRAFT, DEVANEY, AND OVIATT

On February 6, 1990, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a response to the exceptions and a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] In agreeing with the judge that the Respondent violated Sec. 8(a)(5) by failing to provide the Union with requested information, we do not rely on the judge's statements that the Union is entitled to periodic information to monitor the Respondent's use of temporary and part-time employees. The only issue litigated and decided in this case concerns the Respondent's one-time obligation to provide information requested by the Union in its March 1, 1988 letter to the Respondent.

We agree with the judge that the Respondent violated Sec. 8(a)(5) by refusing to provide all the information requested by the Union on March 1, 1988, including wage and fringe benefit information for employees in nonunit classifications who were performing the same work as bargaining unit employees. The Board has held in similar circumstances that such information is relevant to the Union's role in policing the parties' collective-bargaining agreement. See *United Graphics*, 281 NLRB 463, 465 (1986); *Globe Stores*, 227 NLRB 1251, 1253–1254 (1977). For example, the degree of disparity between contractual wages and benefits and the wages and benefits paid those nonunit employees performing unit work could be a significant factor in the Union's assessment of whether the Respondent had breached the contract and whether to file a grievance about the matter.

Member Oviatt agrees with the majority that most of the information requested by the Union in this case is relevant and must be supplied. He would not, however, require the Respondent to comply with the request for wage and fringe benefit information for certain classifications outside the bargaining unit. Member Oviatt acknowledges that the wage and fringe benefit information might be pertinent to contract negotiations. That is not the issue here, however. The parties were operating under a contract that was in midterm and was not about to expire. Thus, the parties apparently were not involved in or preparing for contract negotiations. Rather the question here is whether the contract has been violated by a diversion of unit work out of the bargaining unit. It is Member Oviatt's view the wage and benefit information would not be of any help to the Union in determining whether there has been a breach of the agreement. No doubt a disparity in wages and fringe benefits between unit and nonunit employees performing bargaining unit work would provide the Respondent with a possible motive to divert work out of the bargaining unit. However, the Respondent's possible motive is irrelevant in determining whether unit work is actually being diverted out of the bargaining unit. It is the actual diversion of unit work—not the Respondent's possible motive to divert work—that is allegedly involved here. Thus, in Member Oviatt's opinion there is no basis for requiring Respondent to provide the requested wage and benefit information.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Depository Trust Company, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Ruth Weinreb Esq., for the General Counsel.
Peter D. Conrad, Esq. (Proskauer Rose Goetz & Mendelsohn), for the Respondent.
Thomas J. Lilly. Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. This case was tried in New York, New York, on October 16 and 17, 1989. The charge was filed on September 8, 1988, and the complaint was issued on December 28, 1988. In essence, the complaint alleged that the Respondent refused to furnish certain information that the Union requested by letter dated March 1, 1988.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent is engaged in the business of providing depository and clearing services for various financial institutions including banks.

For at least 30 years the Respondent has had a collective-bargaining relationship with either the present union or another union which merged into Local 153. The most recent contract was executed on January 15, 1988 and runs from November 1, 1987, to November 3, 1990. In accordance with a ''zipper'' clause at article 19, this contract is not subject to midterm negotiations.

The Union is the bargaining representative of the employer's clerks. Excluded from the unit have been various categories of employees who have historically done the same work as bargaining unit employees. Thus, for some time, the contracts between the Company and the Union have explicitly excluded assistant supervisors, account coordinators, part-time employees and persons employed on a temporary basis. Additionally, the evidence shows that for some period of time the employer has also used people employed by outside agencies on either a temporary or part-time basis to do work that is done by bargaining unit employees. (These latter

[1] Errors in the transcript have been noted and corrected.

people have been described interchangeably as contract employees or consultants.)

With respect to the recognized bargaining unit and the fact that there have been other persons who have been engaged by the Company to perform bargaining unit work, the following provisions of the present and preceding collective-bargaining agreements are set forth below:

> 1. The fact the jobs listed above have been excluded from the unit does not preclude the Union from seeking to have them added to the unit through NLRB certification or by mutual agreement: it being understood that means proscribed by Article 13 of this contract will not be employed to obtain such recognition. [Article 13 is a no strike-no lockout clause.]
>
> 2. Persons whose services may from time to time be contracted for by DTC [Depository Trust Corporation], from outside organizations are not employees of DTC and such persons are not covered by any other the terms of this Agreement even though they may perform the same services in a department of DTC as those performed by Employees covered by this Agreement.
>
> 3. Temporary employees will not be obtained for the purpose of causing the dismissal of any member of the bargaining unit. Nothing in this Paragraph, however, shall be deemed to restrict the employment of temporary employees for any other reason. DTC will use its best efforts to limit the use of temporaries.

I also note that the contract contains grievance and arbitration provisions. Additionally, there is a broad management-rights clause at article 18. The management-rights clause reads:

> Except as herein clearly and explicitly limited by an express specific provision of this Agreement, DTC shall continue to have the exclusive right to take any action it deems appropriate in the management of its business and the direction of the work force in accordance with its judgment. All inherent and common law management functions and prerogatives which DTC would have had in there were no bargaining representative and which has not been expressly modified or restricted by a clear and specific provision of this Agreement are retained and vested exclusively in DTC and are not subject to collective bargaining or arbitration under this Agreement.
>
> DTC may from time to time make such rules or regulations as it may deem necessary and proper of the conduct of its Employees, provided that such rules and regulations shall not be inconsistent with the express written provisions of this Agreement. . . . (The agreement provides that the union, if it thinks a new rule or regulation is unreasonable, may take such matter to arbitration.)

In addition to the specific provisions of the relevant contracts, my attention also has been drawn to what the contracts do not say. There is, for example no definition of what constitutes a part-time employee. Also there are no definitions of what constitute temporary employees or contract employees. By the same token, except for the language limiting the use of temporary employees (described above), there is no contract language which purports to limit the Company's use of part-time or contract employees.

The contract preceding the present one was scheduled to expire in November 1987. At some point prior to that time, John Dunn took over as the union business agent to represent the employees of the Respondent. He was informed by various shop stewards that nonunit employees were doing unit work, a fact which is not in dispute.

In June 1987 the Union in preparation for the upcoming negotiations, sent to the Company a demand for wage and benefit information for the bargaining unit employees. Also the Union supplemented this, by requesting statistics regarding the racial and ethnic composition of the unit. This information was supplied to the Union in July.

In September 1987 the Union presented its initial contract proposals to the Company. As part of its demands, and no doubt in response to the fact that nonunit employees were performing bargaining unit work, the Union proposed to modify the recognition clause in certain respects. It proposed that assistant supervisors and account coordinators be included in the unit as well as part-time employees who worked more than 15 hours per week. Also the Union proposed that the Company be limited to using a temporary employee for more than 60 days absent the Union's consent.[2] The company opposed the Union's demands and contended that the Union was trying to expand the bargaining unit and therefore was seeking to negotiate a nonmandatory subject of bargaining. At several points during the negotiations, the Company's negotiators (which included outside labor counsel), suggested that if the Union felt that the Company was violating the agreement by employing nonunit people, the Union should file a grievance under the contract.

According to the credited testimony of John Dunn, on October 30,1987, at a negotiation session, he requested that the Company provide certain information regarding account coordinators, temporary employees, part-time employees, and assistant supervisors. The information requested was for their hours of work, their salaries and benefits, their dates of hire, and their department and work locations. Dunn testified that he told company negotiator Jack Crowley that he had been told by shop stewards that an inordinate amount of unit work was being done by these categories of people. He also testified that he told Crowley that he (Dunn) had been informed by his shop stewards that part-timers were working full-time hours; that temporary workers had been employed for many years; and that assistant supervisors as well as account coordinators were doing the same work as senior clerks, thereby depriving bargaining unit employees of promotional opportunities.

On December 2, 1987, the Union withdrew its request for information regarding assistant supervisors and there is no

[2] I note here that part-time employees and temporary employees have been hired to perform only bargaining unit work. Also, I note that people hired on a part-time or temporary basis to do this type of work have either been hired directly as employees of the Respondent or have been hired through outside agencies. When employed through agencies, part-time or temporary people have been categorized by the parties herein as contract or consulting employees. The record shows that assistant supervisors and account coordinators have other functions and perform bargaining unit only on occasion. In the case of account coordinators, the evidence establishes that they spend about 20 percent of their time doing work that otherwise would be performed by bargaining unit personnel.

claim here that the Company has unlawfully refused to furnish information insofar as that category of employee.

Dunn states that he repeated his request for the information in November 1987 and was told that there was some difficulty in getting the information.

On January 12, 1988, the Company supplied some information to the Union. This was a list purporting to be the names of management personnel and guards that, as of January 6, 1988, were working more than 15 hours per week. The list also set forth the division that the employees worked and their respective dates of hire. After receipt of this list, Dunn complained that this was not the information that he had requested. (It does not contain the benefits, salaries, job categories, or job locations of the employees. It also does not contain the actual hours worked by the employees.)

On January 15, 1988, the parties reached agreement on a new collective-bargaining agreement which was retroactive to November 1, 1987. As noted above, the Union in the face of company opposition, had dropped its demands to alter the recognition clause of the contract.

On March 1, 1988, Dunn sent a letter to Crowley. This read:

> Supplementing our prior request made orally in the course of recent contract negotiations, Local 153, in connection with its collective bargaining responsibilities, requests the following information and/or production of documents;
>
> 1—Set forth identification, employment location (by department/section), and dates of employment of all:
>
> Account coordinator
> Part-time employees (15 hours or more per week)
> Consultants
> Contract employees
> Temporary employees
> Assistant Supervisors
>
> 2—Set forth the weekly hours worked and wages earned for calendar year 1987, by each of the employees set forth in paragraph ''l'' above.
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> 3—Provide copies of any written memoranda, correspondence, side letters, formal or informal agreements, etc. by or between Local 153 and DTC relevant to the status, representation, wages, hours, working conditions or bargaining unit placement of the employees set forth in paragraph ''l'' above.
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> 4—Provide copies of any written letters, memoranda, reports, and documents of any nature in the custody of control of DTC relevant to the hiring criteria, work assignments, wage and hours of employees in the job categories set forth in paragraph ''l'' above.

On March 10 John Hann, the employer's director of labor relations sent a reply letter to Dunn. This read:

> I have received a copy your letter to Mr. John Crowley dated March 1, 1988. Due to the additional information you are requesting, we will require more time to comply with your request. We will forward the relevant information to you as soon as possible.

On March 17 Dunn sent another letter to Crowley reading:

> In our letter of March 1, 1988, the Union requested that you provide certain employee information relevant to the Union's performance of its collective bargaining responsibility.
>
> To date, we have not received your response to our request. The need for this information continues with some urgency. Your failure to comply with this second request by April 1, 1988 will leave us no choice but to pursue other lawful recourse to obtain this information.

On March 24 Hahn sent a letter to Dunn stating in part:

> Although we will consider responding to your request for date reasonably required for the performance of the union's responsibilities as collective bargaining agent, I would appreciate your advising us of the relevance of the various categories of information requested.
>
> In other words, before we do a lot of work, we would like to know for what purpose you need the information so that we can be sure you are entitled to it. If your are entitled to it, we will be pleased to give it to you.

On March 31 Dunn replied:

> In response to your letter dated March 24, 1988, regarding the Union's request for information, the information is required, among other reasons, to make a comparative analysis of the wage hours and working conditions for the employees in the excluded classifications (items ''l'' and ''2'' of our request) with the working conditions of those employees included in the bargaining unit represented by Local 153, since employees in the excluded categories regularly perform work similar or the same as work assignable to bargaining unit personnel; further to investigate compliance with the limitation of work transfers to supervisors and temporary employees.
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> The requested production of documented, (items ''3'' and ''4'') is also sought on similar grounds.
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> It is submitted that the relevance of the requested information is self-evident, and the reasons set-forth above in support of its relevance should not be regarded as the exclusive grounds in support of the requested information .

Thereafter, by letters dated April 11, 1988, and May 26, 1988, the Company advised the Union that there were problems with the computer programs and that more time would be needed.

On August 5, 1988, the Company sent the Union the following letter:

> By letter dated March 1, 1988 . . . you requested certain data concerning employees of DTC who are not represented by the Union. You characterized your request as supplementing a request made during collective bargaining and ''in connection with'' your collective bargaining responsibilities. As the data you requested was voluminous and burdensome to gather and we knew there was no outstanding request of the data

> in any way relating to the by then concluded negotiations for a successor agreement, by letter dated March 24, 1988, we requested further explanation and justification for your request.
>
> Your response to that request, dated March 31, 1988 provides, with one exception, a generalized explanation which does not satisfy the burden of proof imposed on the Union to justify a request for the work location, wages, hours, working conditions and internal company documents related thereto, for non-union employees and other workers. Instead your request is a needless and expensive exploration of DTC records—the classifications in your letter are excluded from the bargaining unit without limitation and the terns and conditions of these classifications are irrelevant to your statutory duties.
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> . . . .
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> With regard to the request concerning work transfers to temporary employees, we have attached a list of temporary employees currently working at DTC, however, as the only CBA limitations are that the company use its ''best efforts'' to limit the number of these employees and that they will not be used to cause the dismissal of any member of the bargaining unit, we have excluded irrelevant and confidential information such as wages from the list.
>
> As you will recall, in response to your request during collective bargaining, we provided you with the names and work locations of all non-bargaining unit employees working more that 15 hours per week. We do not believe you have provided any legal justification requiring us to supplement that data, except as noted above concerning supervisory and temporary work transfers. Should the circumstances change, we will, of course, be willing to fulfill our legal obligations.

Enclosed with the above letter was a list of 23 currently active temporary employees setting forth their names, their dates of hire, their weekly hours, and their locations of employment. I note parenthetically that this list contains ''temporary'' employees who have worked on a full-time basis, many in excess of 1 year and 5 for over 2 years.

In November 1988, there was a meeting of the cross training committee, a joint union-management committee set up as a result of the contract. At this meeting, the Union contended that the Company should be training bargaining unit employees to do work that consultants were being assigned to do. In this regard, the Union has taken the position that the use of consultants to do certain higher levels of clerk work has deprived the more junior bargaining unit clerks from learning certain skills and therefore has limited their promotional possibilities. According to Dunn, there also have been assertions by some unit employees, many of whom are black that the use of these outside consultants or contract employees, most of whom are white, has had a discriminatory impact on promotional opportunities.

III. ANALYSIS

The General Counsel contends that the information requested by the Union in its March 1, 1988 letter (exclusive of information relating to assistant supervisors), was relevant for two purposes. First, the postulates that it was needed to determine if the Company was breaching the labor contract and for the purpose of policing the existing collective-bargaining agreement in that it could be used to determine if work was being diverted out of the bargaining unit to the detriment of the work and promotional opportunities of the bargaining unit employees. Secondly, she asserts that the information was relevant to the Union's need to prepare for future contract negotiations.

The Respondent counters that even if the information requested would be relevant for purposes of contract negotiations, the complaint does not allege that the employer unlawfully refused to furnish this information in connection with the negotiations that led up to the contract that was agreed to on January 15, 1988. The Respondent points out that the March 1, 1988 request was made less than 2 months after the new contract was reached and about 2-1/2 years before negotiations would reasonably have begun for a new contract. In this regard the Respondent notes that the existing agreement would allow it (by virtue of the zipper clause) to refuse to reopen the contract during its life. The Respondent also points out that the Union never asserted prior to this hearing that the information was requested so as to formulate new contract proposals.

The Respondent also contends that to the extent that it has refused to furnish the information requested by the Union's March 1 request, the Union has not demonstrated or even expressed why the information would be relevant to administer the existing collective-bargaining agreement. In this regard, the Respondent asserts that the contract gives it the unrestricted right to use part-time and contract employees (a/k/a consultants). It also contends that pursuant to the management-rights clause, it has the unrestricted right to assign whatever work it wishes to account coordinators. Accordingly, the Respondent contends that because of these contractual provisions, no conceivable grievance could have merit and therefore the information requested would not be relevant for purposes of policing the contract. As to temporary employees, the Respondent asserts that the contract gives it broad discretion to hire such persons and that it met its statutory obligation by furnishing information regarding temporary employees on August 5, 1988.

In *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967), the Court held that the employer was obligated to furnish information in relation to both pending and potential grievances, so as to enable the Union to assess the merits of a grievance. Accordingly, information which would tend to disprove the validity of a grievance would be just as relevant as information which would tend to establish the merits of a grievance. The Court stated:

> When the respondent furnishes the requested information, it may appear that no subcontracting or work transfer has occurred, and accordingly, that the grievances filed are without merit. . . .
>
> Far from intruding upon the preserve of the arbitrator, the Board's action was in aid of the arbitration process. Arbitration can function properly only if the grievance procedures leading to it can sift out nonmeritorious claims. For if all claims originated as grievances had to be processed through to arbitration, the system would be woefully overburdened.

In *Ohio Power Co.*, 216 NLRB 987, 991 (1975), the Board formulated a test for evaluating the relevance of broad categories of requested information as follows:

> Where the information sought covers the terms and conditions of employment within the bargaining unit, thus involving the core of the employer-employee relationship, the standard of relevance is very broad, and no specific showing is normally required; but where the request is for information with respect to matters occurring outside the unit, the standard is somewhat narrower (as where the precipitating issue or conduct is the subcontracting of work performable by employees within the appropriate unit) and relevance is required to be somewhat more precise. . . . The obligation is not unlimited. Thus, where the information is plainly irrelevant to any dispute there is no duty to provide. it.
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> . . . .
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> It is not required that there be grievances or that the information be such as would clearly dispose of them. The union is entitled to the information in order to determine whether it should exercise its representative function in the pending matter, that is, whether the information will warrant further processing of the grievance or bargaining about the disputed matter.

As noted above, although a Union is presumptively entitled to information regarding bargaining unit employees, that presumption does not follow when the information requested concerns nonunit employees. Further, where such nonunit information is requested, the Union must demonstrate some objective basis and not mere suspicion, to support the request's alleged relevance. Thus, in the *Brooklyn Union Gas Co.*, 296 NLRB 591 (1989), the Union based on reports that nonbargaining unit employees were being assigned to do bargaining unit work, requested a listing of all management job classifications in each department, job descriptions for such classification, the number of persons in those jobs and their names. The administrative law judge noted:

> The second category of information requested by the Union concerns work performed by employees outside the bargaining unit. The company is under no statutory obligation to furnish such information unless the information is shown to be relevant to bargainable issues and it can be determined from all the surrounding circumstances, that the Company was informed, or otherwise was aware, of the relevance of the information requested. . . . Furthermore, in assessing the Union's legitimate need for nonunit information, the Union must have more than a mere suspicion that the Company has diverted unit work. It must have an objective and reasonable basis upon which to conclude that the information is necessary.[3]

In *United Graphics*, 281 NLRB 463 (1986), the employer utilized, from time to time, a temporary agency to furnish temporary employees to do bargaining unit work. When the Union discovered this, it requested information concerning the names, addresses, wages, and fringe benefits of those temporary employees. The Respondent contended that it was not obligated to give this information, asserting among other reasons that these people were nonunit employees and were not in fact, employed by the Respondent. The Board stated:

> Furthermore, even assuming that the temporary workers are nonunit employees, it is clear that information regarding individuals who are engaged in performing the same tasks as rank-and-file employees within the bargaining unit ''relates directly to the policing of contract terms.''
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> . . . .
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> We further find that the Respondent's other defense based on non-possession of the requested information is without merit. The Respondent has stipulated that Personnel Pool provides it with the names of the temporary workers. As for the other information requested, there is no evidence that the Respondent has requested Personnel Pool to provide it with the information that the Union has sought. The Respondent thus has failed to demonstrate that such information is unavailable. Accordingly, we conclude that the Respondent has violated Section 8(a)(5) and (1) of the Act by failing and refusing to supply the information requested about the temporary workers' names, addresses, wages and fringe benefits.

Similarly, in *Jaggers-Chiles-Stovall*, 249 NLRB 697, 700–701 (1980), the employer refused to turn over earnings information for individuals who were nonunit supervisors and where pursuant to the contract, foremen and assistant foremen could perform unit work. The administrative law judge stated:

> Even though the Union may not have advised Respondent of the reasons for requesting the earnings information until the hearing, Respondent was called upon to furnish it because of its presumed relevance.
>
> . . . .
>
> The Union is entitled to earnings information on assistant foremen and even foremen as they may, under the contract, perform unit work, which of course, would result in the loss of unit work for other employees. Such information is essential to the Union in policing of the collective-bargaining agreement.

In the present case, it seems to me that the information requested was relevant to the Union's role in policing the contract.

The Company contends that information regarding the wages and benefits of temporary employees would not be relevant because the contract gives it virtually free rein to utilize such persons who would not be part of the bargaining unit. Nevertheless, the contract does not give the Company complete freedom on this score as it provides, inter alia, that the Company will use its best efforts to limit the use of temporaries. Given the fact that the Union was in possession of objective information that temporary employees were being used to do unit work, it seems to me that it should be entitled to utilize information, in the form of records, to determine whether the use of such persons was becoming unreasonable. Further, there comes a point in time when a person

[3] See also *Sheraton Hartford Hotel*, 289 NLRB 463 (1988), where the Board stated that a union needs to do more than express some ''hypothetical theory explaining how the information might be useful in determining whether the Respondent has violated the parties' contract.''

who is hired on a temporary basis no longer is a temporary employee. The evidence shows that some of these temporary employees have been employed from 1 to 2 years. As such, the Union would certainly be in a position of arguing to an arbitrator that persons who were claimed to be temporary employees were in fact permanent employees who should be covered by the labor contract's wage and benefit provisions.

Similarly where as here, temporary employees are used to do unit work, it seems to me that the Union should be entitled to periodic information so as to monitor whether such persons are really temporary employees or whether they are in reality, permanent employees.

In the case of part-time employees the employer asserts that anyone who is employed less than 35 hours per week is a part-time employee. Yet there is nothing in the contract that indicates that this is a definition that was agreed to by the Union. I do not know what an arbitrator might decide if he or she was asked to define a part-time employee under this contract. It cannot be said, however, that the outcome would be cut and dried or that the Union would have no reasonable basis for arguing that persons who work less than 35 hours per week on a regular basis should be considered full-time employees entitled to the wages and benefits of the collective-bargaining agreement. Further, as in the case of temporary employees, it seems to me that the Union is entitled to monitor, from time to time, company records to ascertain whether people have been correctly classified as part-time employees, even under the Company's definition of that term. (For example, it is hypothetically conceivable that the records might show that a ''part-time'' employee worked 3 weeks at 34 hours per week and worked another 3-week period at 36 hours per week.)

As to contract employees, the Company takes the position that these people are not its employees and that it is entitled, under the contract to use such persons to do bargaining unit work from time to time. Here again, it seems to me that the contract does not purport to give the Company absolute discretion as it limits the use of contract employees for the period of ''time to time.'' In my opinion, the Union could argue to an arbitrator, if the appropriate records so indicated, that the Company has been using contract employees on a steady and extended basis rather than from time to time. Moreover, despite the contention by the Company that these persons are not its employees, if the records coupled with other evidence showed that persons within this category were employed for extended periods of time and were under the Respondent's direction and control, the Union might reasonably assert that these persons were in fact employees of the Respondent and subject to the terms and conditions of the collective-bargaining agreement.

With respect to account coordinators, the evidence shows that these people spend at least 20 percent of their time doing bargaining unit work. The labor agreement simply excludes this category of employees from the bargaining unit and does not either expressly prohibit or permit them from doing bargaining unit work. As such, it seems to me that the Union would be entitled to the information requested as it might contend in a grievance or before an arbitrator that the contract should be interpreted to impose a limit of reasonableness insofar as their use in doing bargaining unit work.

In all the categories described above, I have indicated how the Union might use the information in the context of the contract's grievance and arbitration procedure. Equally important, however, is the fact that the receipt of this information might demonstrate to the Union that certain employee fears were groundless and that invocation of the grievance procedure with the concomitant expenditure of time and money, would not be warranted.

The company contends that even if the information requested is relevant, the Union failed to adequately explain such relevancy when it made the requests. Although it is true that the Union's explanations as to why it needed the information left a good deal to the imagination, it is sufficient if under all the circumstances, the relevancy of the requested data is evident to the Respondent. *Island Creek Coal Co.*, 292 NLRB 480 (1989).

Clearly the Company was aware from the 1987 contract negotiations that the Union was concerned by the extent to which the Company was having nonunit people perform bargaining unit work. When the Union sought to change the contract to include some of these persons within the bargaining unit, the Company resisted and contended that this was not an appropriate subject of collective bargaining. Indeed, the Company suggested during negotiations that if the Union believed that the contract was being violated by its use of nonbargaining unit people to do unit work, that the Union invoke the contract's grievance-arbitration procedure. As such, it ill behooves the Company to argue that it could not fathom why the Union was asking for the information after the contract was executed. It is obvious to me, as it must have been obvious to the Company's experienced labor counsel that the Union intended to use this information to evaluate whether the facts would show a breach of the contract and whether, as suggested by the Company, the Union should invoke the grievance-arbitration provisions of the collective-bargaining agreement. Thus, it is my opinion that the relevance of the requested data was self-evident given the circumstances and in light of the entire pattern of facts leading up to the Union's request. To the extent that the employer sought to require the Union to further explain its reasons for the desired information it seems to me that the employer, in effect, was seeking to have the Union divulge not simply its reasons for relevancy but also seeking to have the Union state its legal theory as to why it believed that the contract might be breached. In all the circumstances, it is my opinion that the Union sufficiently explicated the relevancy of the information requested.

Having concluded that the Union was entitled to the requested information for the purpose of administering the existing collective-bargaining agreement, it therefore is not necessary for me to decide whether the Union was also entitled to the same information for the purpose of attempting to reopen this contract or negotiating a new contract 2-1/2 years after the request was made.[4]

[4] The evidence shows that there are no documents which would fit the description of the information requested in par. 3 of the Union's March 1 request. In fact the union made this particular request to establish the nonexistence of any documents such as side letters between the Union and the Company which would modify the terms of the collective-bargaining agreement. As such, I shall not order the Company to produce that which does not exist.

CONCLUSIONS OF LAW

1. Depository Trust Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Office & Professional Employees International Union, Local 153, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times material, the Union has been the exclusive representative of certain employees of the Respondent in an unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

4. By refusing to supply certain information regarding account coordinators, part-time employees, temporary employees, and consultants/contract employees, the Respondent has violated Section 8(a)(5) and (1) of the Act.

THE REMEDY

Having found that the Respondent engaged in unfair labor practices I shall recommend that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act including an order that it furnish the requested information to the Union, exclusive of documents which do not exist or which after due diligence, cannot be obtained.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Depository Trust Company, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to supply The Office & Professional Employees International Union, Local 153, AFL–CIO with information relevant and necessary to the performance by it of its obligations as bargaining representative of employees of the Respondent.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request furnish the Union the following information:

(1) The names, employment locations and dates of hire of all account coordinators, part-time employees who work more than 15 hours per week, temporary employees, and consultants/contract employees.

(2) The weekly hours worked and the wages earned by the persons named above in subparagraph 1 for the calendar year 1987 and/or any other appropriate period of time prior to entry of a final order in this case.

(3) Copies of any letters, memoranda, reports or other documents in the custody or control of the Respondent which set forth the criteria for hiring the persons described in subparagraph 1 or which describe the criteria by which their hours of work are determined, their rates of pay are determined, or by which their work assignments are made.

(b) Post at its facilities in New York, New York, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 2 after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to supply the Office & Professional Employees International Union, Local 153, AFL–CIO with information relevant and necessary to the performance of its obligations as bargaining representative of our employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

WE WILL on request furnish to the Union the following information:

(a) The names, employstment locations and dates of hire of all account coordinators, part-time employees who work more than 15 hours per week, temporary employees, and consultants/contract employees.

(b) The weekly hours worked and the wages earned by the persons named above in subparagraph (a) for the calendar year 1987 and/or any other appropriate period of time prior to entry of a final order in this case.

(c) Copies of any letters, memoranda, reports, or other documents in the custody or control of the Respondent which set forth the criteria for hiring the persons described in subparagraph (a) or which describe the criteria by which their hours of work are determined, their rates of pay are determined, or by which their work assignments are made.

DEPOSITORY TRUST COMPANY